No. 22639

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
For the Use and Benefit of
C. H. BENTON, INC., a California
corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,
doing business as TRUETT PAINTING
COMPANY; and FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

Defendants and Appellees.

On Appeal From the United States District Court
For the Southern District of California

BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered on October 9, 1967 by the United States District Court for the Southern District of California. Said action was predicated upon the Miller Act (40 U. S. C. 270b (b)).

STATEMENT OF THE CASE

This was a suit brought by the Use Plaintiff against Defendant Roelof and Roelof's bonding company, namely Defendant Fidelity, for painting materials furnished Defendant Roelof for the painting of some United States Government buildings (Bayview-Cabrillo housing). This was a bonded job, the bond having been

furnished by Defendant Fidelity. Use Plaintiff Benton had been furnishing for some one and a half to two years materials on a number of jobs, some of which were bonded and some of which were not (Rep. Tr., p. 14, ll. 3 through 6, and p. 36, ll. 2 through 13). Said account between Use Plaintiff and Defendant Roelof reflected in one manner or another Use Plaintiff supplying to Defendant Roelof the sum of $31,441.72 worth of paint for the Bayview-Cabrillo housing project.

Use Plaintiff claims that there is still due and owing the sum of $4,983.09 on the Bayview-Cabrillo job but Defendant Roelof's contention is that there is presently nothing due and owing on said Bayview-Cabrillo housing project, that Defendant Roelof has paid these amounts in full as was the usual course of business between Use Plaintiff and Defendant Roelof, and therefore, said job was fully paid.

FACTS OF THIS CASE

Use Plaintiff as a supplier of paints, and Defendant Roelof, as a painting contractor, did business with each other and in fact had an open account between them for some one and a half to two year period prior to June of 1966 (Rep. Tr., p. 14, ll. 1 through 6, and Rep. Tr., p. 36, ll. 2 through 13). These materials were furnished by Use Plaintiff to Defendant Roelof for work done by Defendant Roelof on a number of jobs, some of which were bonded and some of which were not. According to Use Plaintiff, this account was kept current until some time during the course of the Bayview-Cabrillo job (Rep. Tr., p. 6, ll. 14 through 24), and thereafter, Use Plaintiff commenced writing in his general ledger the particular jobs for each charge and each credit (Rep. Tr., p. 6, ll. 9 through 12). Use Plaintiff would always, of course, accompany any

materials sold by them to the Defendant Roelof with invoices which would show the name of the jobs and the place of deliveries as set forth in Defendants' Exhibits K and L. Use Plaintiff had, during the course of its dealings with Defendant Roelof, sent letters to one or two other job owners requesting in the future joint checks made payable to Use Plaintiff and Defendant Roelof (Rep. Tr., p. 26, ll. 5 through 9).

Defendant Roelof, in maintaining its books and records with respect to its account with Use Plaintiff, would as a normal practice upon receipt of a statement, check the invoices against the statement and see that they were correct and the balance owing was in fact correct, and then make a tender of a specific amount, correlating it with the amount due on the old balance first, to the Use Plaintiff. The Defendant Roelof would then retire the old invoices into a particular job file (Rep. Tr., p. 36, ll. 14 through 23). Use Plaintiff in addition to rendering statements to Defendant Roelof as an open account, would from time to time render statements to Defendant Roelof on specific jobs (Defts. Exs. I and J). This is further substantiated by Defendants' Exhibits E, F, G. H, I, J, K, and L.

It is established that between the dates April 30, 1965 and April 5, 1966, Use Plaintiff furnished to Defendant Roelof paint for the use on Bayview-Cabrillo jobs (Pre-Trial Stipulation and Order, paragraph III, subparagraph C). The last statement sent by Use Plaintiff covering purchases made by Defendant Roelof on the Bayview-Cabrillo job was in the first part of May 1966 (Rep. Tr., p. 9, ll. 1 through 4).

On June 22, 1966 and June 23, 1966, an attempt was made between the Use

Plaintiff and Defendant Roelof to resolve the account between the two. A meeting took place between the representatives of the Use Plaintiff and Defendant Roelof and there was then in progress a job known as the Hanalei job wherein Defendant Roelof was performing certain painting work, the Use Plaintiff having theretofore furnished to the Defendant Roelof painting materials on that job. This was a non-bonded job, but Use Plaintiff still retained its lien rights on said job because Defendant Roelof had not finished its work as of that date on said job.

According to Use Plaintiff's records, there was no material furnished on the Hanalei job after June 20, 1966 (Rep. Tr., p. 84, ll. 5 through 9). At the meeting of June 22 and/or 23, 1966, Defendant Roelof requested of Use Plaintiff a lien release on the Hanalei job. Use Plaintiff refused to execute said lien release unless the Defendant Roelof executed a promissory note (Defts. Ex. A), pay some cash, and make two assignments of moneys due on two other of Defendant Roelof's jobs to which Use Plaintiff had furnished materials (Defts. Exs. B and C; Rep. Tr., p. 13, ll. 2 through 17). Defendant Roelof in fact did execute a promissory note (Defts. Ex. A), the two assignments (Defts. Exs. B and C), paid some cash, and Use Plaintiff executed a release on the Hanalei job (Defts. Ex. D). The note, together with the two assignments and the cash, approximated the amount then due and owing from the Defendant Roelof to the Use Plaintiff.

At that meeting Use Plaintiff contends that it gave to the Defendant Roelof orally the information set forth in Plaintiff's Exhibit 4 which is a recap of the account due and owing between the parties at that time, setting forth therein which jobs the note would cover and in fact which jobs the two assignments would

cover (Rep. Tr., p. 10, ll. 1 through 6). Defendant Roelof denied ever having been advised by the Use Plaintiff of such a breakdown (Rep. Tr., p. 33, l. 25, and p. 34, ll. 1 through 7).

Thereafter, Use Plaintiff received from the Defendant Roelof interest payments and principal payments on said note for the period August 1, 1966 through January of 1967 (Rep. Tr., p. 23, ll. 21 through 25, and page 24, ll. 1 through 15), as well as substantial cash payments as a result of the two assignments (Defts. Exs. B and C). Thereafter, the Complaint in this matter was filed on March 28, 1967 wherein Use Plaintiff sought to recover the sum of $4,983.09 together with interest thereon at the rate of 7% per annum from April 5, 1966, alleging that these moneys were due and owing on the Bayview-Cabrillo bonded job for materials furnished between August 30, 1965 and April 5, 1966, and seeking relief against Defendant Roelof as well as Defendant Fidelity on said bond.

On April 18, 1967, the Defendant Roelof answered said Complaint admitting that during the period of August 30, 1965 through April 5, 1966 Use Plaintiff supplied to the Defendant Roelof paint in the reasonable value of $31,441.72 on the bonded job known as Bayview-Cabrillo, but denied that there was any sum then due and owing on that job by the Defendant Roelof to the Use Plaintiff. Thereafter, on May 3, 1967, Defendant Fidelity filed a similar answer to that of Defendant Roelof.

On September 15, 1967, the matter went to trial and the District Court entered its judgment on October 9, 1967.

This appeal followed.

SUMMARY OF ARGUMENT

We have here a course of dealings between the Use Plaintiff and the Defendant Roelof which commenced in very early 1965. Both parties testified that this was in effect an open book account, however, there were instances wherein Use Plaintiff specifically billed by invoice and/or statement naming a particular job. It is also uncontradicted that in either one or two instances Use Plaintiff sent letters directly to job owners requesting that all future checks be joint checks between Use Plaintiff and Defendant Roelof so as to insure payments to Use Plaintiff for materials supplied. Further, it is uncontradicted that the invoices and/or statements submitted by Use Plaintiff to Defendant Roelof would generally set forth the name of the given location and job where the materials were to be delivered and in specified dollar amounts. Further, it would follow from Defendant Roelof's testimony by Truett, which is the only logical explanation of the nature of the relationship between the parties, that Use Plaintiff was aware, because of the amounts tendered to them by the Defendant Roelof, of the specific jobs, i. e., the source of funds, that is usually well-established in the industry (Rep. Tr., p. 36, ll. 17 through 23). This is further substantiated by the fact that Use Plaintiff was required from time to time to execute releases on jobs wherein Defendant Roelof had or was performing work (Plf. Ex. 7 dated May 5, 1966). In addition thereto, Defendant Roelof had, over a period of some two years, paid to the Use Plaintiff specific sums of money as called for by the way Defendant Roelof would retire the old invoices and put them in the job file (Defts. Exs. E through L, respectively).

Therefore, it is quite apparent that Use Plaintiff, over a considerable period of time prior to and after the completion of the bonded job, applied moneys received from Defendant Roelof to the oldest due account regardless of the source. This is abundantly clear from the record.

In this connection, Use Plaintiff was aware that the bonded job Bayview-Cabrillo was completed by Defendant Roelof in April of 1966 as reflected by their own books and records wherein the last purchase made by Defendant Roelof was in April of 1966 (Rep. Tr., p. 9, ll. 1 through 4), and they were further aware that the Hanalei job which was not bonded was in progress and Defendant Roelof was doing work on said job during the month of June 1966 when Use Plaintiff testified that he specifically talked to the general contractor on said job, namely Mr. Cory. The Use Plaintiff contends that by reason of Section 1479 of the California Civil Code it was entitled to credit the money it received in any manner it saw fit. This is just not so. The cases hold that in a Miller Act suit Federal law will apply, and in this connection the Federal cases hold that if the creditor knows or has reason to believe that the moneys paid him are from a particular bonded job, he has the duty to apply the funds so received from the debtor upon that account. See United States for the Use of Briggs v. Grubb, 358 F. 2d 508, 513 (Ninth Circuit, 1966); St. Paul Fire and Marine Insurance Company v. United States for the Use of Dakota Electric Supply Co., 302 F. 2d 22 (Eighth Circuit.1962).

The account between the Use Plaintiff and Defendant Roelof was resolved, as the evidence discloses, to the satisfaction of Use Plaintiff on June 22 and June 23, 1966. It was not merely an extension of credit, but rather substantially all of the

open book account was taken care of in one manner or another. The uncontradicted evidence discloses that on June 22 and/or June 23, 1966 that said open account between the parties was resolved by the Defendant Roelof assigning to the Use Plaintiff sums then due and owing the Use Plaintiff in the amounts of $1,706.23 and $3,300.00, plus paying to the Use Plaintiff some cash, and in addition to which the Defendant Roelof issued in favor of the Use Plaintiff its promissory note for the sum of $5,736.98. It is further conceded and uncontradicted by the evidence that the amount of the promissory note included more than the amounts then due and owing on the Bayview-Cabrillo (bonded) jobs. It is further undisputed that at the time of resolving said account there were moneys due and owing on the Hanalei job.

Further, the Defendant Roelof, according to its books and records, a portion of which are in evidence as Defentants' Exhibits E through L, respectively, stated that it had paid off in full the Bayview-Cabrillo job in May or June of 1966.

There would seem to be no other logical conclusion from the facts as presented in this case that what really took place on or about June 22 and/or 23, 1966, at the time the account was resolved between the parties, was that the promissory note (Defts. Ex. A) covered the amounts due and owing on the Hanalei job and the two assignments (Defts. Exs. B and C), plus the cash given to Use Plaintiff, paid off the balance of the account. This would seem to be clearly the case and unquestionably the only logical inference drawn from the testimony of Mr. Charles Benton, one of the owners of the Use Plaintiff, when he stated on or about June 22, 1966 he contacted Mr. Cory, the general contractor on the Hanalei job,

and requested joint checks, which request was denied by Mr. Cory; and further, he requested assistance in paying off the amounts then due and owing the Use Plaintiff by the Defendant Roelof on the Hanalei job, to which Mr. Cory gave certain assurances to Mr. Benton. This testimony is uncontradicted. Further, and much more logical, Mr. William Benton, also one of the owners of the Use Plaintiff, testified (Rep. Tr., p. 72, ll. 18 through 22) that the Use Plaintiff on June 22 and/or 23, 1966 gave up its lien security on the Hanalei job by executing the release dated 6/22/67 (Defts. Ex. D) for and in consideration of defendants executing said promissory note (Defts. Ex. A). How is it logically possible to resolve that testimony with the contention of Use Plaintiff that the promissory note given on or about that time was to cover the Bayview-Cabrillo jobs, and that the two assignments did in fact pay off the Hanalei job. Neither the oral testimony and/or the books and records of both Use Plaintiff and Defendants will support such a contention. It must further be kept in mind that the very purpose of the meeting was for Defendant Roelof to obtain a lien release on the Hanalei job, and Use Plaintiff requested as a condition precedent to issuing the lien release that Defendant Roelof deliver to Use Plaintiff (1) the promissory note (Defts. Ex. A), (2) the two assignments (Defts. Exs. B and C), and (3) cash (Rep. Tr., p. 47, ll. 6 through 10).

The Use Plaintiff claims that it gave Defendant Roelof a recap of Plaintiff's Exhibit 4 which indicated how they were applying the promissory note (Defts. Ex. A) to the account between the parties. Defendant Roelof denied this and stated that it was its understanding that the note was to be applied to the Hanalei job in that it had already paid Use Plaintiff in full for the bonded jobs which had been completed in

April. This I submit is a conflict in the testimony, and the trier of fact chose to believe Defendant Roelof.

By resolving the account between the parties, the Use Plaintiff materially prejudiced the Defendant Fidelity. The Use Plaintiff extended, by the terms of the promissory note (Defts. Ex. A), the period over which Defendant Roelof could retire the account. The Use Plaintiff in fact did receive several payments on said note during the ensuing seven or eight month period following execution of same. It is further uncontradicted that after the execution of the promissory note (Defts. Ex. A) Defendant Roelof paid over to Use Plaintiff considerable sums of money which Use Plaintiff applied to suit its particular purposes at the time, contrary to the established practice as developed between Use Plaintiff and Defendant Roelof. Thus, it would appear that Defendant Fidelity might have protected itself had it been aware of the extension and/or the alleged failure of the Defendant Roelof to have paid for the material used on the bonded jobs.

It is rather apparent what Use Plaintiff is trying to do here, and that is -- after the bonded jobs were paid off and Use Plaintiff had reconciled its account with Defendant Roelof on June 22, 1966 by taking a note (Defts. Ex. A), Use Plaintiff found, some nine months later, that Defendant Roelof had defaulted on its note. Use Plaintiff then decided to take the position that Defendant Roelof had not fully paid off the bonded jobs and brought this action to recover from the Defendant Fidelity on the bond, rather than enforce the terms of the promissory note.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's judgment be affirmed and that this appeal be dismissed.

Respectfully submitted,

/s/ HAROLD F. TEBBETTS

Attorney for Defendants and Appellees.

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ HAROLD F. TEBBETTS

APPENDIX

APPENDIX

TABLE OF EXHIBITS

Exhibits	Transcript Page	
	Marked for Identification	Received in Evidence
Plaintiff's #4 (Work sheet showing accounts due on promissory note)	14	31
Plaintiff's #7 (Copy lien release of Vacation Village)	63	89
Defendants' #A (Promissory Note dated 6/23/66)	10	67
Defendants' #B (Assignments of moneys on Vacation Village job dated 6/22/66)	10	67
Defendants' #C (Assignment dated 6/22/66 for $1,100	11	67
Defendants' #D (Release dated 6/22/67)	11	67
Defendants' #E (Seven statements of Use Plaintiff)	23	67
Defendants' #F (Statement of Use Plaintiff to Defendant)	25	67
Defendants' #G (Series of statements 8-65 through 5-66)	34	67
Defendants' #H (25 checks)	35	67
Defendants' #I (18 documents)	39	67
Defendants' #J (12 documents)	39	67
Defendants' #K (Series of invoices with recap tally sheets)	56	67
Defendants' #L (Series of invoices)	66	67